Supreme Court, U.S.
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82-2044

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN FOOD EQUIPMENT CO.
Petitioner,

vs.

FOSS AMERICA, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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June 1983

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QUESTION PRESENTED

Whether it is constitutionally permissible, even though the parties have consented thereto, for a federal district court magistrate, a non-Article III judge, to try, decide and render judgment in a civil action.

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No.

WESTERN FOOD EQUIPMENT CO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner – Plaintiff Western Food Equipment Co. ("Western") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on November 22, 1982.

PROCEEDINGS BELOW

This case commenced in 1976 by the filing of an action by respondent Foss America, Inc. ("Foss") against petitioner Western in the United States District Court for the District of Oregon, jurisdiction being founded on diversity of citizenship under 28 U.S.C. § 1332(a). A number of claims were joined by both parties, and, because of the

posture of the case near the time of trial, upon the motion of Western, the parties were reversed, Western becoming the plaintiff and Foss the defendant.

The parties consented to trial by a federal magistrate, stipulating that the "decision by a magistrate will have the same effect as if made by a United States District Judge." From November 27 to December 19, 1979 one part of the case involving factual and damage issues was tried to a jury by magistrate George E. Juba, and from January 29 to January 31, 1980 another part of the case involving legal and equitable issues was tried to the magistrate alone.

On February 25, 1980 the magistrate issued an order entitled "Opinion, Findings of Fact and Conclusions of Law" (not officially reported). A copy is attached as Appendix A. Based upon the magistrate's order, the Clerk of the Court entered judgment against Western on certain later-appealed claims.

An appeal was filed by Western and on November 22, 1982, the United States Court of Appeals for the Ninth Circuit filed a Memorandum Opinion (not officially reported) affirming the magistrate's judgment (Appendix B). On March 14, 1983, the appellate court denied Western's petition for rehearing (Appendix C).

JURISDICTION

The judgment on the Ninth Circuit Court of Appeals was made final by the denial of Western's petition for rehearing. Jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 17.1 of the Rules of this Court. 28 U.S.C. § 2403(a) may be applicable. No court of the United States has certified to the Attorney General the fact

that the constitutionality of the 1979 Magistrate's Act has been drawn into question.

QUESTION PRESENTED

Does the 1979 Magistrate's Act, 28 U.S.C. § 636(c), violate Article III of the United States Constitution by permitting non-Article III magistrates, even with the parties' consent, to be invested with the full judicial power of the United States?

THE LAW INVOLVED

Article III, Section 1 of the Constitution of the United States of America provides that:

> The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

In pertinent part, the 1979 Magistrate's Act,

28 U.S.C. § 636(c) provides:

> (c) Notwithstanding any provisions of law to the contrary—
>
> (1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when

> specially designated to exercise such jurisdiction by the district court or courts he serves . . .

As to the tenure of a magistrate, the 1979 Magistrate's Act, 28 U.S.C. § 631(e) & (i) provide:

> (e) The appointment of any individual as a full-time magistrate shall be for a term of eight years, and the appointment of any individuals as a part-time magistrate shall be for a term of four years, except that the term of a full-time or part-time magistrate appointed under subsection (k) shall expire upon—
>
> (1) the expiration of the absent magistrate's term,
>
> (2) the reinstatement of the absent magistrate in regular service in office as a magistrate,
>
> (3) the failure of the absent magistrate to make timely application under subsection (j) of this section for reinstatement in regular service in office as a magistrate after discharge or release from military service,
>
> (4) the death or resignation of the absent magistrate, or
>
> (5) the removal from office of the absent magistrate pursuant to subsection (i) of this section,
>
> whichever may first occur.
>
> (i) Removal of a magistrate during the term for which he is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability, but a magistrate's office shall be terminated if the conference determines that the services performed by his office are no longer needed. Removal shall be by the judges of the district court for the judicial

> district in which the magistrate serves; where there is more than one judge of a district court, removal shall not occur unless a majority of all the judges of such court concur in the order of the removal; and when there is a tie vote of the judges of the district court on the question of removal or retention in office of a magistrate, then removal shall be only by a concurrence of a majority of all the judges of the council. In the case of a magistrate appointed under the third sentence of subsection (a) of this section, removal shall not occur unless a majority of all the judges of the appointing district courts concur in the order of removal; and where there is a tie vote on the question of removal or retention in the office of a magistrate, then removal shall be only by a concurrence of majority of all the judges of the council or councils. Before any order or removal shall be entered, a full specification of the charges shall be furnished to the magistrate, and he shall be accorded by the judge or judges of the removing court, courts, council or councils an opportunity to be heard on the charges.

As to compensation of a magistrate, the 1979 Magistrate's Act, 28 U.S.C. § 633(c) provides:

> (c) Changes in Number, Locations and Salaries. Except as otherwise provided in this chapter, the conference may, from time to time, in the light of the recommendations of the Director, the district courts, and the councils, change the number, locations and salaries of full-time and part-time magistrates, as the expeditious administration of justice may require.

In *Northern Pipeline Co. v. Marathon Pipe Line Co.*, ____ U.S. ____, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982), this Court held the Bankruptcy Act of 1978 unconstitu-

tional on the ground that the Act conferred Article III judicial power upon judges who lacked life tenure and protection against salary dimunition. Although there was no majority opinion, six of the justices did agree that the Act was unconstitutional under Article III of the United States Constitution.

STATEMENT OF THE CASE

The underlying substantive case involved three issues which were adjudicated by the magistrate: (1) whether Western's conduct before the United States Patent Office with respect to an application for a United States Patent was improper and if so, whether that conduct could be characterized as "fraudulent" so as to permit the court to award attorney's fees to respondent Foss America under the "exceptional" case provision of 35 U.S.C. § 285; (2) whether, given the jury's general verdict of $300,000 in favor of Western on its trade secret misappropiation claim against Foss, judgment should have been granted in *Foss'* favor and against Western; and (3) whether, given the disputed nature of the evidence at trial, the trial court should have permitted the jury to assess Western's claim against Foss America for deceit. Notwithstanding the jury's verdict in Western's favor, the magistrate ruled against Western on all three claims. Based upon the magistrate's rulings, judgment was entered against Western by the Clerk of the Court dismissing Western's trade secret misappropriation and deceit claims against Foss and awarding attorney's fees under 35 U.S.C. § 285 to respondent Foss America in the amount of $35,000.

REASONS FOR GRANTING THE WRIT

In order to secure an independent judiciary to provide checks and balances against the Executive and Legislative branches of government, Article III, Section 1 of the Constitution has laid down two essential prerequisites with respect to the appointment of judges who are to be given the full judicial authority of the United States:

1. Life tenure on good behavior, *Toth v. Quarles,* 350 U.S. 11 (1955); and

2. Non-dimunition of salary, *United States v. Will,* 449 U.S. 200 (1980).

In *Northern Pipeline, supra,* this Court concluded:

> The inexorable command of this provision is clear and definite: The judicial power of the United States must be exercised by Courts having the attributes prescribed by Article III.

73 L.Ed 2d at 607.

Although the 1979 Magistrate's Act, 28 U.S.C. § 636(c), grants to magistrates full judicial authority of the United States with the parties' consent, neither of these two essential criteria are met:

1. 28 U.S.C. § 631(e) provides for limited terms of four and eight years, while 28 U.S.C. § 633(i) provides for removal for a wide variety of reasons other than misbehavior, including the ground that the magistrate's "services are no longer needed."

2. 28 U.S.C. § 633(c) provides that magistrates' salaries may be *changed* from time to time "as the expeditious administration of justice may require."

The common thread of the justices' opinion in the *Nor-*

thern Pipeline case is submitted to be concern with these precise constitutional drawbacks in the Bankruptcy Act of 1978, which purported to grant similar Article III authority to bankruptcy judges who lacked life tenure and protection against salary diminution.*

This very concern was previously expressed by this Court in *United States v. Raddatz,* 447 U.S. 667 (1980) when considering the provision of the Magistrate's Act, 28 U.S.C. § 636(b)(1), which referred "dispositive" motions to a magistrate for proposed findings and recommendation, but required final decision by a district court judge (with life tenure and non-dimunition of salary). The plurality opinion noted:

> Thus, although the statute permits the district court to give to the magistrate's proposed findings of fact and recommendations "such weight as [their] merit commands and the sound discretion of the judge warrants," Mathews v. Weber, supra, at 275, 46 L.Ed. 2d 483, *that delegation does not violate Art III so long as the ultimate decision is made by the district court.*

447 U.S. at 683 (Emphasis added)

Here, under 28 U.S.C. § 636(c), the ultimate decision is *not* made by the district court. Moreover, in a dissenting opinion, Justice Marshall, joined by Justice Stewart, felt that the Court should have been even more strict:

> The Court's unwillingness to construe the relevant provision in this fashion may be attributable to an understandable desire to minimize existing burdens on federal district judges, burdens that

*Other serious potential problems in having magistrates serve as Article III judges have been noted. See "Note: Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View," 88 Yale L.J. 1023 (1979).

> may seem especially unnecessary with respect to the gathering and evaluation of the facts. But the replacement of Art. III judges with magistrates, even if the replacement extends only to the finding of facts, erodes principles that strike near the heart of the constitutional order. In such contexts considerations of administrative cost are least forceful, and the Court must be most wary lest principles that were meant to endure be sacrificed to expedience.

447 U.S. at 713.

Since the requirements of Article III are fundamentally jurisdictional, they cannot be waived by the parties' consent. In *Patton v. United States*, 281 U.S. 276 (1930), in addressing the issue of whether the constitutional right to trial by jury could be waived, this Court quoted with approval from *Low v. United States*, 169 Fed. 86 (6th Cir. 1909):

> Undoubtedly, the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the Court.

And recently, in *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, 456 U.S. 694, 72 L.Ed. 2d 492, 500-501 (1982), this Court said:

> Subject matter jurisdiction, then, is an Article III as well as a statutory requirement; it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign. Certain legal consequences directly follow from this. For example, no action of the parties can confer subject matter jurisdiction upon a federal court. Thus, the consent of the parties is irrele-

vant, California v. La Rue 409 U.S. 109, 34 L.Ed. 2d 342, 92 S.Ct. 390 (1972), principles of estoppel do not apply, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18, 95 L.Ed. 702, 71 S.Ct. 534 (1951), and a party does not waive the requirement by failing to challenge jurisdiction early in the proceedings. Similarly, a court, including an appellate court, will raise lack of subject matter jurisdiction on its own motion. [T]he rule, springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its jurisdiction, and the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record. Mansfield Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 382, 28 L.Ed. 462, 4 S.Ct. 510 (1884).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June 1983

I, the undersigned, hereby certify pursuant to the provisions of Rule 28.3 of the Rules of the Supreme Court of the United States that on June 13, 1980 I served the foregoing Petition for Writ of Certiorari upon all parties required to be served by deposition of three printed copies thereof in a sealed envelope, with first class airmail postage prepaid, in the United States Post Office in Washington, D.C. addressed to each of such persons at the regular office address listed below:

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APPENDIX A

Magistrate's Opinion, Findings of Fact and Conclusions of Law dated February 25, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

WESTERN FOOD EQUIPMENT CO., Plaintiff,	)	
v.	)	Civil No. 76-755
FOSS AMERICA, INC., Defendant	)	

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

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JUBA, Magistrate:

In August 1976, Foss America, Inc. (Foss) filed a complain against Western Food Equipment Co. (Western)

alleging non-payment of amounts owing on its sale to Western of milk testing equipment. Western counterclaimed, alleging unlawful termination of a distributorship and breach of a confidential relationship. In April 1977, Western added a third counterclaim for patent infringement.

Foss was awarded partial summary judgment on the non-payment claim in June 1977. In December 1978, Western withdrew the counterclaims for unlawful termination of a distributorship and patent infringement, and they were dismissed with prejudice. However, Western added a counterclaim for deceit, alleging two separate misrepresentations. In April 1979, Foss was permitted to add a claim against Western for slander.

Before trial, Foss was awarded partial summary judgment on the deceit claim as to one of the misrepresentations, since it was barred by the statute of limitations. During trial it became apparent that the statute of limitations had also run on the second misrepresentation and the deceit counterclaim was dismissed.

The parties were realigned for trial, with Western as plaintiff and Foss as defendant. The case was tried before a jury. The only claims to be decided were Western's claim for breach of a confidential relationship and Foss' claim for slander. The jury found for Western on the misappropriation claim and awarded Western $275,000. general damages and $25,000. punitive damages. On the slander claim, the jury found against Foss and in favor of Western.

Foss now moves under Fed. R. Civ. P. 49(b) for judgment in its favor on the confidential relationship claim and for an award of attorney fees on the previously dismissed patent infringement claim.

I. BREACH OF A CONFIDENTIAL RELATIONSHIP

The jury returned a general verdict in favor of Western on the confidential relationship claim. Before deliberation, the court instructed the jury as follows:

> The owner of confidential information cannot, by disclosing the confidential information, prevent the recipient from using any information or knowledge that was already in the recipient's possession at the time the information was disclosed. Nor can the owner of the confidential information, by disclosing the information, prevent the recipient from using information or knowledge that subsequently comes into his possession from a third party who has acquired the information or knowledge without assistance from the owner of the confidential information. *Therefore, if you find that the information disclosed to Foss America by Western was already known to Foss America or to its supplier, Foss Electric (Denmark), then you must find for Foss America.*

(Emphasis added).

The above instruction was derived from an instruction proposed by Foss, to which Western made timely objection. The proposed instruction was then amended with Western's participation, and Western did not take any exception to the instructin in its final form.

Both parties collaborated in the drafting of special interrogatories given to the jury. Interrogatory number six asked:

> Was the allegedly confidential information disclosed by Western Food to Foss America previously known to Foss America's supplier, Foss Electric (Denmark)?

The jury answered "yes" to the interrogatory.

Foss contends that the answer to interrogatory number six is inconsistent with a jury verdict in Western's favor and that Foss is accordingly entitled to a judgment in its favor under Fed. R. Civ. P. 49(b). Foss further contends that Western is now precluded from objecting to the jury instruction since Western did not preserve any objection for the record. Fed. R. Civ. P. 51. Western contends that the answer to interrogatory number six is consistent with the general verdict in its favor and that the jury instruction, as given, does not correctly state the law. Western further contends that its original objection was sufficient to preserve the record on appeal.

Objection to jury instruction

Western correctly states that it filed a written objection to Foss' proposed jury instruction on the defense to the confidential relationship claim. However, that jury instruction was subsequently amended. Western participated in the amendment. Western did not object to the instruction as amended, and contrary to Western's assertion, Western had ample opportunity to object. I therefore conclude that Western did not preserve an objection to the jury instruction for purposes of appeal, and is foreclosed from objecting for the first time now. Fed. R. Civ. P. 51.

Fed. R. Civ. P. 49(b)

Rule 49(b) allows the court to submit to the jury a general verdict form and special interrogatories. When the general verdict and the answers to the special interrogatories are consistent, the court may enter judgment under Rule 58 in accordance with the jury's general ver-

dict. When the answers to the special interrogatories are consistent with each other, but inconsistent with the general verdict, the court has three options. The court may (1) enter judgment in accordance with the answer to the special interrogatories, notwithstanding the general verdict;[1] (2) return the jury for further deliberations; or (3) order a new trial. *Blackwell v. Cities Service Oil Co.*, 532 F.2d 1006, 1008 (5th Cir. 1976). The court may not enter judgment on the general verdict. *Blackwell,* at 1008; *Turchio v. D/S/ A/S Den Norske Africa,* 509 F.2d 101, 106 (2nd Cir. 1974). Before exercising any of the above options, the court must try to reconcile the answers to the special interrogatories with the general verdict if reconciliation is possible. *Julien J. Studley, Inc. v. Gulf Oil Corporation,* 407 F.2d 521, 527 (2nd. Cir. 1969).

Western contends that the answers to interrogatory number six can be reconciled with the general verdict. I disagree.

Under the jury instruction on Foss' defense to the misappropriation claim, Foss had a complete defense if Foss or its supplier, Foss (Denmark), already had the information supplied by Western. Western now contends that the defense was applicable only if Foss used its information, and not Western's. Western points it that the jury, in answers to interrogatories three and our, found that Foss used the information supplied by Western.

Western's contention is valid only if Oregon law provides that the recipient of confidential information must

[1]The first option is foreclosed if the answers to the special interrogatories are also inconsistent with each other, Rule 49(b); *Mayview Corp. v. Rodstein*, Civil Nos. 77-3468 and 77-3481 (9th Cir. Feb. 4, 1980). Here the answers to the interrogatories are consistent with each other.

not only already have that information, but must use the information already in its possession, and not the information provided confidentially. Western has failed to cite any Oregon case in support of that propostion. In fact, Oregon law, as contained in the lead case of *E. V. Prentice Dryer Co. v. Northwest Dryer Co.*, 246 Or. 78, 82-83 (1967), is contrary to Western's position.

In *Prentice*, the plaintiff accused defendant Gordon of breaching a confidential relationship by misappropriating information obtained by Gordon when he worked for plaintiff. The evidence indicated that Gordon had copied and used information contained in one of plaintiff's blueprints. The Oregon Supreme Court stated:

> The clearest evidence of plagiarism was that relating to defendant's use of plaintiff's blueprints in making tracings and copies. But in doing so, defendant did not acquire any information concerning the Prentice dryer or plaintiff's method of manufacture and sale not already known to Gordon as a result of his previous employment with plaintiff and others.

246 Or. at 82-83.

The court was acknowledging that Gordon used the information obtained from his employment with Prentice, but held that he had a complete defense because he already had knowledge of the information used.

I conclude that under Oregon law Foss established a complete defense by showing it already possessed the information supplied by Western. The jury instruction was therefore a correct statement of the law. Even if Western were belatedly allowed to object to that instruction, it would be of no avail.

In light of the the jury instruction, the jury's answer to interrogatory number six is irreconcilable with the general verdict in Western's favor. The evidence supports the jury's answer that Foss Electric (Denmark) already knew of the information supplied by Western. I therefore conclude that Foss established a complete defense to the misappropriation claim. Nothing would be gained by ordering a new trial or requiring the jury to continue deliberations. (In fact, the latter is precluded since the jury panel has been discharged.)

I therefore conclude that Foss is entitled to judgment in its favor on the misappropriation claim, notwithstanding the general verdict. Fed. R. Civ. P. 49(b).

II. ATTORNEY FEES

Shortly after the initiation of this case, Western filed a counterclaim against Foss, alleging patent infringement. In December 1978, twenty months later, Western withdrew the counterclaim and it was dismissed with prejudice. Foss now seeks attorney fees as the prevailing party on the patent claim, under 35 U.S.C. § 285.

After trial, an evidentiary hearing was conducted before the court to determine whether Western committed fraud on the Patent Office, thereby warranting an award of attorney fees to Foss.

35 U.S.C. § 285 provides that, in a patent infringement case, "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." If the party defending the infringement action proves that the patent applicant committed fraud on the Patent Office in obtaining a patent, the fraud alone is sufficient to convert the action into an exceptional case. *Monolith Portland*

Midwest Company v. Kaiser Aluminum and Chemical Corporation, et al., 407 F.2d 288, 294 (9th Cir. 1969). Furthermore, conduct short of fraud, but which exhibits a "calculated recklessness about the truth and which constitutes a serious breach of duty (of candor) to the Patent Office" is sufficient to make the case exceptional. *Id.* at 297. I find that this case is exceptional.

The threshhold requirement to the award of attorney fees is that the movant be the prevailing party. Here, the patent infringement claim was not tried because Western withdrew it. Western now argues that an award of attorney fees to Foss would be unfair and would discourage parties from settling disputes without trial, if they are subjected to the possibility of being penalized anyway.

While I share Western's view that parties should not be discouraged from settling disputes without trial, I am also aware that a significant cost is involved in defending a patent infringement claim, whether or not the claim is actually tried. Discovery, often expensive, must proceed on the assumption the case will be tried. Significant research is done in anticipation of trial. Here, twenty months elapsed before Western withdrew the patent infringement claim. The fact that the claim was not tried does not automatically render attorney fees inapplicable. However, the fact that Western withdrew the claim will be a factor in determining what constitutes "reasonable" attorney fees.

Western's patent

On April 17, 1975, Western filed an application with the Patent Office for issuance of a patent on a milk standardization process invented by Joseph Lester, a Western employee. Lester was intimately involved in the prosecution of the patent application. On December 15, 1975, and

again, in May 1976, the Patent Office rejected Western's application on the ground that it was obvious and anticipatory of prior art. In October 1976, Western filed an amendment to its application, together with four declarations by experts in the field to establish that the Lester invention was not obvious because of prior art. The four declarants, Lloyd Luedecke, Paul R. Elliker, Roy Stein, and Fred W. Froese, each stated that Lester's process analyzes the butterfat content of reblended milk and uses that information to adjust the reblending system to obtain a product of uniform butterfat content. Each declarant stated that Lester's process was unique in the dairy industry. The prior art concerned a "batch" process which required a known butterfat content to begin with. Lester's process was a "continuous" process which did not require a known butterfat content at the outset.

On December 6, 1976, as a result of filing of Western's amendment, and the declarations of the four experts, the Patent Office issued a "Formal Notice of Allowance" of the patent application. On April 12, 1977, the Lester milk standardization process was issued U.S. Patent No. 4,017,643.

Fraud on the Patent Office

Foss contends that Western, through its employee, Joseph Lester, committed fraud on the Patent Office. Foss alleges that Lester knew of a continuous milk standardization process similar to his in 1973, but never made it known to the Patent Office. Foss further contends that Lester was aware that a similar system was put on sale more than a year before Western's application was filed with the Patent Office. Such knowledge, contends Foss, was sufficient to establish an on-sale bar to the Lester pa-

tent, under 35 U.S.C. § 102(b). Finally, Foss contends that Western did not state the best mode for the Lester invention in its application to the Patent Office as required by 35 U.S.C. § 112[2]. Foss argues that Western's conduct in prosecuting the patent application constituted a fraud on the Patent Office, or at the least, constituted a pattern of conduct reflecting a calculated disregard for the truth, resulting in a serious breach of Western's uncompromising duty of candor to the Patent Office.

I find that Lester's knowledge of a potential on-sale bar to his patent application is not sufficient to warrant a conclusion that he seriously breached a duty of candor to the Patent Office. Lester testified that he believed that the system allegedly on sale was a paper system which would not work out. To constitute an "on-sale bar" to patentability under 35 U.S.C. § 102(b), an invention must be reduced to practice, not experimentally, but commercially. *Austin v. Marco Dental Products, Inc.*, 560 F.2d 966 (9th Cir. 1977). No evidence was introduced that the alleged on-sale invention was complete or ready for use. While Lester's testimony was not credible in some areas, I do not find he acted in bad faith in not reporting the potential on-sale bar. Similarly, the failure to report the "best mode" of his invention is at the most a minor breach.

There remains the most significant and crucial issue of Lester's failure to report the existence of a system similar

[2]Foss also contends that Western is liable for a misstatement made by Paul Elliker to the Patent Office on the Lester claim, because of a contradictory statement he made to the Patent Office on an unrelated claim. Under no circumstances is there any agency relationship on the separate statements, and Elliker's alleged fraud is not attributable to Western.

to his which, if reported, might have been fatal to his patent application.

At trial on Western's misappropriation claim, Lester testified that he was aware, at the time the patent application was filed, of an article written by Lloyd E. Slater in *Food Engineering,* November 1973, describing work being done at Harbisons[3] on butterfat standardization. Lester later testified at an evidentiary hearing to determine the attorney fees issue, that he had never read the *Food Engineering* article in its entirety. Lester contended that he had understood, from a letter he received from Van Stringham describing the work at Harbisons, that the process there merely involved a monitoring or alarm system, and was not a continuous system involving the reblending of blended milk to achieve a uniform butterfat content. Therefore, testified Lester, he was not that interested and did not pay too much attention to the *Food Engineering* article or the work being done at Harbisons.

However, Lester also testified that he had seen a letter sometime in 1973 which described the work being done at Harbisons in a way which, if understood, could not be misinterpreted. During his testimony on this letter, Lester was evasive on whether he actually read or understood what was involved in the Harbison process. He agreed that the contents of the letter were consistent with the contents of the *Food Engineering* article, and inconsistent with his idea of what was being done at Harbison. Lester ultimately testified in response to questions on cross-examination:

> Q: So now you don't think you read this letter; is that what you're telling me? Foss 592.

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[3]Harbisons is a division of Southland Corporation. The work done there involved a milko-tester machine supplied by Foss Electric (Denmark).

A: Could be that I didn't.

Mr. Lester's testimony on what he did or did not know about the work being done at Harbisons was equivocating and evasive to say the least. There is no question that he knew that the work was being done at Harbisons. As the ultimate judge of a witness' credibility, I find it incredible that Lester did not know the significance of the work at Harbisons before he filed the patent application. He kept a copy of the *Food Engineering* article detailing the work at Harbisons in his work file and had also seen a letter in 1973 outlining the work at Harbisons in a manner consistent with the magazine article. I find that Lester did know of the work being done at Harbisons and the significance of that work.

Materiality of knowledge

It is apparent from the record as a whole that the Patent Office reversed its previous rejection of the Lester patent because of the declarations of Elliker, Stein, Froese and Luedecke, submitted in an amendment to the Lester application. Each of the declarants stated that he was unaware of any process similar to Lester's, thereby distinguishing the Lester process from prior art. Luedecke stated:

> To my personal knowledge, no one heretofore has relied upon the butterfat content of reblended milk in order to control the amount of butterfat in reblended milk. To my knowledge, no one has heretore suggested or developed a process which permits the continuous processing of milk as has been devised by Mr. Lester, and as shown and described in his patent application. Mr. Lester's process is a decided improvement in the art.

In testimony at trial on the misappropriation claim, Luedecke testified that he could not have made that statement had he known about the *Food Engineering* article. He further testified that neither Lester nor anyone else at Western informed him of the *Food Engineering* article at the time he executed the above-quoted declaration.

Similar, Dale A. Seiberling[4], an expert in the dairy industry, testified at trial that statements made by Elliker, Stein, Froese and Luedecke about the Lester process could apply equally to the process described in *Food Engineering*.

The evidence introduced at trial, and at the subsequent hearing on attorney fees, established that the milk standardization process described in the *Food Engineering* article published in November 1973, was so closely akin to the Lester process that it could not be ignored in the prosecution of Lester's patent application. The evidence further established that Western through its employee Lester, induced experts to make declarations about Lester's process, for the purpose of securing a patent, that Lester knew to be untrue.

I find that Lester's conduct in prosecuting the patent application constituted active fraud on the Patent Office sufficient to convert the patent infringement claim into an exceptional case under 35 U.S.C. § 285. I find that Foss is entitled to reasonable attorney fees, the amount to be determined at a future date, taking into account the fact that Western voluntarily withdrew its patent infringement claim before trial.

[4]Seiberling owns a patented invention relating to the milk standardization process, which has been characterized as a "batch" process.

IT IS ORDERED:

1. Judgment shall be entered for Foss and against Western on the breach of confidential relationship claim.

2. Foss is entitled to attorney fees, the amount to be determined at a future date.

The above shall constitute findings of fact and conclusions of law pursuant to Rule 52(a), Fed. R. Civ. P.

Dated this 25 day of February, 1980.

/s/ George E. Juba

United States Magistrate

APPENDIX B

Opinion of U.S. Court of Appeals, 9th Cir., dated November 22, 1982

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOSS AMERICA, Inc., a corporation Plaintiff/Appellee,	)	
vs.	)	CA No. 80-3226
	)	DC No. CV 76-755
WESTERN FOOD EQUIPMENT COMPANY, a corporation, Defendant/Appellant .	)	

MEMORANDUM

Appeal from the United States District Court
for the District of Oregon
George E. Juba, Magistrate, Presiding
Argued and submitted October 4, 1982

Before: WALLACE, FARRIS, and POOLE, Circuit Judges.

We affirm the award of attorneys' fees. The finding that the patent infringement claim was an "exceptional case" under 35 U.S.C. § 285 is within the court's discretion. We find no abuse of discretion nor do we find that the law has been erroneously applied. *Maurice A. Garbell, Inc. v. Boeing Co.*, 546 F.2d 297 (9th Cir. 1976), *cert. denied*, 431 U.S. 955 (1977).

The primary issue is the effect of prior knowledge by Foss Electric on Western Food's claim for misappropria-

tion of confidential information. The issue has two components: 1) whether knowledge of Foss Electric was also possessed by Foss America and 2) whether such knowledge is in itself a defense. The jury was instructed without objection:

> The owner of confidential information cannot, by disclosing the confidential information, prevent the recipient from using any information or knowledge that was already in the recipient's possession at the time the information was disclosed. Nor can the owner of the confidential information by disclosing the information prevent the recipient from using information or knowledge that subsequently comes into his possession from a third party who has acquired the information or knowledge without assistance from the owner of the confidential information. *Therefore, if you find that the information disclosed to Foss America by Western was already known to Foss America or to its supplier, Foss Electric (Denmark), then you must find for Foss America.* [Emphasis added.]

There was an objection to an earlier form of this instruction suggested by Foss America. The court responded by adopting Western Food's proposal on use of information or knowledge not obtained from the confidential source and adding its own direction to the jury as a concluding sentence. This appeal contests a result compelled by the court's additional language. Following the charge to the jury, Western Food's counsel was given the opportunity to state any objections. At this point counsel objected only to the court's instruction concerning damages. No exception was taken to the prior knowledge charge. The court then asked whether there were any other exceptions. Counsel's response, "No, Your Honor," was a waiver of objection. Fed. R. Civ. P. 51.

The latter part of the instruction provides a defense if either Foss America or Foss Electric had prior knowledge. The knowledge of Foss Electric is thus imputed to Foss America. At trial Foss America contended that it was aware of the relevant information possessed by Foss Electric. By failing to make a timely objection to the instruction, Western Foods accepted this version of the facts. It is now precluded from challenging the instruction's resolution of the issue in favor of Foss America.

The plain error rule generally may not be invoked in civil appeals to obtain review of an unchallenged instruction. *Pierce Packing Co. v. John Morrell & Co., 633 F.2d 1362, 1365 (9th Cir. 1980); Moore v. Telefon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978); *Bock v. United States*, 375 F.2d 479, 480 (9th Cir. 1967). We will review the propriety of a jury instruction to which exception was not taken where the trial court was apprised of appellant's opposition to the instruction and further objection would have been unavailing. *See Brown v. Avemco Investment Corp.*, 603 F.2d 1367, 1370-71 (9th Cir. 1979); *Robinson v. Heilman*, 563 F.2d 1304, 1306-07 (9th Cir. 1977). Assuming arguendo that Western Food's objection to Foss America's proposed instruction and its own substitute adequately informed the trial court for purposes of Fed. R. Civ. P. 51 that it objected to the court's language regarding the knowledge defense, we find no error in the court's charge.

We reject Western Food's argument that prior knowledge of the technical data was not a defense if Foss America or Foss Electric actually used communicated information. Though the jury found in interrogatories 3 and 4 that "Foss," without specifying Foss America or Foss Electric, used the information acquired from Western Foods, the trial judge concluded that use has no bearing

on the prior knowledge defense. *See E.V. Prentice Dryer Co. v. Northwest Dryer & Machinery Co.*, 246 Or. 78, 82-83, 424 P.2d 227, 230 (1967). We defer to this interpretation of state law since it is not "clearly wrong." *See Airlift International, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982); *Power v. Union Pacific Railroad Co.*, 655 F.2d 1380, 1382 (9th Cir. 1981). In light of the court's direction, the jury's affirmative response to interrogatory 6 provided a complete defense under Oregon law.

Affirmed.

APPENDIX C

Order of the U.S. Court of Appeals, 9th Cir., denying Petition for Rehearing dated March 14, 1983

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOSS AMERICA, Inc., a corporation Plaintiff/Appellee,	)	
vs.	)	CA No. 80-3226
	)	DC No. CV 76-755
WESTERN FOOD EQUIPMENT COMPANY, a corporation, Defendant/Appellant.	)	(Oregon) ORDER

Before: WALLACE, FARRIS, and POOLE, Circuit Judges.

Appellant's petition for rehearing is denied.

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-2044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN FOOD EQUIPMENT CO.
Petitioner,

vs.

FOSS AMERICA, INC.
Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 15, 1983

THE CASILLAS PRESS, INC. – 1717 K Street N.W. – Washington, D.C. – 223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2044

WESTERN FOOD EQUIPMENT CO.

Petitioner,

vs.

FOSS AMERICA, INC.

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Supplementary to Western Food's Petition for Writ of Certiorari filed June 13, 1983, petitioner respectfully notes for the court's attention that the United States Court of Appeals for the Ninth Circuit in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, in an August 5, 1983 decision reproduced in the appendix hereto, has ruled that Section 636(c) of Title 28 of the United States Code (the 1979 Magistrate's Act) is unconstitutional in that it violates Article III of the United States Constitu-

tion. This is the very same issue to which the undersigned's pending petition is addressed.

Respectfully submitted,

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August 15, 1983

I, the undersigned, hereby certify pursuant to the provisions of Rule 28.3 of the Rules of the Supreme Court of the United States that on August ____, 1983 I served the foregoing Supplemental brief upon all parties required to be served by depositing three printed copies thereof in a sealed envelope, with first class airmail postage prepaid, in the United States Post Office in Washington, D.C. addressed to each of such persons at the regular office address listed below:

United States Court of Appeals for the
Ninth Circuit
U.S. Court of Appeals & Post Office Building
7th & Mission Streets, P.O. Box 547
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APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit in Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., dated August 5, 1983.

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PACEMAKER DIAGNOSTIC CLINIC OF AMERICA, INC., a Tennessee Corporation, Plaintiff-Appellant, Cross-Appellee,	) C.A. Nos. 82-3152, 82-3182
v.	) D.C. No. CV 79-601-JU
INSTROMEDIX, INC., an Oregon Corporation Defendant-Appellee, Cross-Appellant.	) OPINION

Appeal from the United States District Court
for the District of Oregon
Hon. George E. Juba, United States Magistrate, Presiding

Argued – January 5, 1983
Submitted – March 31, 1983

Before: FERGUSON, BOOCHEVER, and NORRIS, Circuit Judges.
BOOCHEVER, Circuit Judge:

This case concerns the constitutionality of section 636(c) of the Magistrates Act which allows magistrates, with consent of the parties to the litigation, to conduct civil trials and enter judgments. 28 U.S.C. § 636(c) (Supp. V 1981). Because this procedure offends article III of the Constitution, we reverse and remand for *de novo* review by the district court.

FACTS

Pacemaker Diagnostic Clinic of America, Inc. charged Instromedix, Inc. with infringement of a patent. Instromedix denied infringement and alleged that the patent was invalid. The parties consented to have the case tried by a magistrate sitting without a jury. The magistrate found the patent valid, but not infringed.[1] Both parties appealed to this court. We raised the issue of the magistrate's jurisdiction *sua sponte* because of the possible unconstitutionality of 28 U.S.C. § 636(c), which empowered the magistrate to enter judgment in this case.[2] Because we hold that the provision is unconstitutional, we do not reach the merits of the patent issues.

DISCUSSION

I.
Background

Article III of the United States Constitution vests the judicial power in the Supreme Court and in such inferior courts as Congress may establish. It provides that the judges shall hold their offices during good behavior and shall not have their compensation diminished during their continuance in office. Because the office of federal magistrate is not similarly protected, we must decide whether an amendment to the Magistrates Act runs afoul of the article III dictates. The 1979 amendments to the Magistrates Act added, among other changes, 28 U.S.C. § 636(c), which confers judicial power on the magistrates, with consent of the parties, to conduct any or all pro-

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[1] *But see Mobil Oil Corp. v. Filtrol Corp.*, 501 F.2d 282, 293-94 (9th Cir. 1974).

[2] The court would like to thank the parties and *amici curiae*, the Department of Justice and the Oregon State Bar, for their helpful briefs on this difficult issue.

ceedings in a jury or nonjury civil case and order the entry of judgment. 28 U.S.C. § 636(c)(1). The magistrate must be specially designated by the district court to exercise this jurisdiction. *Id.* Procedures are set up to prevent district judges or magistrates from coercing the parties to give their consent. 28 U.S.C. § 636(c)(2). The district judge has the power to vacate the reference of the case to the magistrate. 28 U.S.C. § 636(c)(6). Appeals from the magistrate's judgment may be taken to the court of appeals in the same manner as an appeal from any other judgment of the district court. 28 U.S.C. § 636(c)(3). Alternatively, the parties may consent to have the appeal heard by the district court. 28 U.S.C. § 636(c)(4).

Even before the 1979 amendments, magistrates were allowed to conduct entire trials in some districts.[3] 28 U.S.C. § 636(b)(3) (1976), still in effect, allows a district judge to assign a magistrate duties that are not inconsistent with the Constitution and laws of the United States. In this circuit, *Coolidge v. Schooner California,* 637 F.2d 1321 (9th Cir.), *cert. denied,* 451 U.S. 1020 (1981) interpreted this language as broad enough to allow a magistrate to conduct entire trials. To be consistent with the statute and the constitution, however, the district judge must engage in a *de novo* review of the proceedings. In this way, it is the district judge and not the magistrate who exercises the article III powers. *See also Britt v. Simi Valley Unified School District,* No. 81-5284, slip op. at 2781-82 (9th Cir. June 13, 1983) (per curiam).

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[3] *E.G., Muhich v. Allen,* 603 F.2d 1247 (7th Cir. 1979); *De Costa v. Columbia Broadcasting Systems, Inc.,* 520 F.2d 499 (1st Cir. 1974), *cert denied,* 423 U.S. 1073. *See also* Hearing before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 96th Cong., 1st Sess. 16 (1979) (statement of Chief Judge Skopil, District of Oregon) (concerning practice in District of Oregon prior to 1979 amendments).

By contrast, the 1979 addition of 28 U.S.C. § 636(c), here in issue, explicitly allows trial by magistrate, but does not provide for *de novo* review by the district judge.[4]

To the same effect as *Coolidge* is *United States v. Raddatz,* 447 U.S. 667 (1980). *Raddatz,* concerned the constitutionality of 28 U.S.C. § 636(b)(1)(B), which permits a district court to refer to a magistrate a motion to suppress evidence in a criminal case. Under that subsection, the magistrate conducts a hearing and submits proposed findings of fact and recommendations for disposition. The parties may file objections. The district court judge is then charged with making a *de novo* determination of the portions of the magistrate's report to which objection is made. The judge may freely accept or disregard the magistrate's finding and may take additional evidence. The Supreme Court found that because the district judge made the final determination, due process and article III rights were adequately protected. The Court declined to decide whether Congress could have delegated the task of rendering a final decision to a non-article III officer. 447 U.S. at 681.[5] We must address that issue in the present case.

II.
Exercise of Article III Powers by Magistrates

The Supreme Court recently addressed the issue of the exercise of judicial power by non-article III officers in *Northern Pipeline Construction Co. v. Marathon Pipeline*

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[4]The court in *Coolidge* explicitly declined to state an opinion on the constitutionality of 28 U.S.C. § 636(c). 637 F.2d at 1324 n.2.

[5]Only Justice Marshall, joined in dissent by Justice Brennan, reached this issue. 447 U.S. at 703-11. They concluded that magistrates may not enter final judgments.

Co., ____ U.S. ____, 102 S. Ct. 2858 (1982).[6] A plurality of the Supreme Court plust two concurring justices held the bankruptcy court system to be unconstitutional. The plurality reasoned that bankruptcy judges were not article III judges, that the bankruptcy courts were not constituted as article I courts, and that the bankruptcy courts could not properly be considered "adjuncts" to the district courts. The plurality also held that the invalidity of the bankruptcy courts would only be applied prospectively. The *Northern Pipeline* analysis mandates a similar result in our case.

A. Lack of Article III Attributes

Magistrates are clearly not article III judges. *United States v. Jenkins,* No. 82-1352, slip op. at 3108 n.1 (9th Cir. June 28, 1983); *United States v. Saunders,* 641 F.2d 659, 663 (9th Cir. 1980), *cert. denied,* 452 U.S. 918 (1981). Article III judges are distinguished by life tenure during good behavior and salary protection. U.S. Const. art. III, § 1. Life tenure and salary protection serve the purpose of protecting the independence of the judiciary. Northern Pipeline, 102 S. Ct. at 2864-66. By contrast to article III judges, federal magistrates serve for eight year terms and must retire at age seventy. 28 U.S.C. §§ 631(d), (e) (Supp. V 1981). Magistrates may also be removed from office during a term for incompetency, misconduct, neglect of duty, or physical or mental disability, and a sitting magistrate's office may be terminated if the Judicial Conference decides that the office is no longer needed. 28 U.S.C. § 631(i) (Supp. V 1981). The salaries of magistrates are also not protected. Salaries may be changed by the

[6]The justices did not agree upon an Opinion of the Court. Four justices agreed to the plurality opinion; two justices concurred in the judgment, with opinion; three justices dissented, with opinion; and Chief Justice Burger also dissented in a separate opinion.

Judicial Conference to further the expeditious administration of justice. 28 U.S.C. § 633(c) (Supp. V 1981).[7]

B. Article I Courts

Article I of the Constitution empowers Congress to establish legislative courts separate from the article III system. U.S. Const. art. I, § 8, cl. 9. The magistrate system does not qualify under this provision. As explained in *Northern Pipeline,* Congress may only establish separate courts in a limited class of cases "in which the grant of power to the Legislative and Executive Branches was historically and constitutionally so exceptional that the congressional assertion of a power to create legislative courts was consistent with, rather than threatening to, the constitutional mandate of separation of powers." 102 S. Ct. at 2868. Examples include courts for the territories and the District of Columbia, courts martial, and legislative courts and administrative agencies created to adjudicate cases involving "public rights". *Northern Pipeline,* 102 S. Ct. at 2868-71. The delegation to the magistrates is not so limited, as they may try any jury or nonjury matter with the consent of the parties. 28 U.S.C. § 636(c)(1).[8]

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[7]28 U.S.C. § 634(b) limits the flexibility in adjusting the magistrates' salaries. A magistrate's salary may be reduced during his term in office but not below what it was at the beginning of the term. *Id.*

[8]The parties note that the underlying dispute here concerns patent law. The plurality in *Northern Pipeline* conceded the ability of Congress to create article I courts in certain specialized areas. For example, in the case of courts martial, the political branches of government possess extraordinary, constitutionally recognized control over the subject matter at issue. U.S. Const. art. I, § 8, cls. 13, 14, art. II, § 2, cl. 1 amend. V. Congress' power to grant patents is also explicitly authorized in the Constitution. U.S. Const. art. I, § 8, cl. 8. The plurality refused, however, to allow Congress to set up non-article III legislative courts pursuant to all of its enumerated powers. For example, the power to regulate bankruptcies is also committed to Congress

Therefore, 28 U.S.C. § 636(c) cannot be construed as establishing legislative courts.

C. Magistrates as Adjuncts of the District Court

It is also contended that 28 U.S.C. § 636(c) establishes the magistrates as "adjuncts" to the district courts.[9] The *Northern Pipeline* plurality reviewed *Crowell v. Benson,* 285 U.S. 22 (1932), and *United States v. Raddatz,* 447 U.S. 667 (1980), cases where Congress' use of administrative agencies and magistrates as adjuncts to article III courts had been upheld. The plurality took these cases as establishing two methods under which Congress may constitutionally vest traditionally judicial functions in non-article III officers. The first is that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated. No newly created substantive federal rights are involved here, as the magistrates are empowered to try any federal case within the jurisdiction of the district courts. Therefore, section 636(c) cannot be justified on this ground. The second method, crucial here, is by a restricted delegation whereby,

> the functions of the adjunct must be limited in such a way that "the essential attributes" of

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in the Constitution, U.S. Const. art. I, § 8, cl. 4, but the plurality still rejected the bankruptcy courts as special legislative courts.

Secondly, it is only coincidental that this case concerns patents. Magistrates have the power to try *any* jury or nonjury civil matter, not just patent cases. 28 U.S.C. § 636(c)(1).

[9]In *United States v. Jenkins,* No. 82-1352 (9th Cir. June 28, 1983), the government contended that magistrates are adjuncts to the district court and that consent by a criminal defendant to trial before a magistrate waives the right to trial before an article III judge. The court declined to reach these issues, slip op. at 3108, holding instead that the constitution does not require that crimes committed on a federal enclave be tried before an article III judge, slip op. at 3109-10. *Jenkins* thus left these issues open.

> judicial power are retained in the Art. III court. Thus in upholding the adjunct scheme challenged in *Crowell,* the Court emphasized that "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Ibid.* And in refusing to invalidate the Magistrates Act at issue in *Raddatz,* the Court stressed that under the congressional scheme "[t]he authority — and the responsibility — to make an informed, final determination . . . remains with the judge,' " 447 U.S. at 682, quoting *Mathews v. Weber,* 423 U.S. 261, 271 (1976); the statute's delegation of power was therefore permissible, since "the ultimate decision is made by the district court," 447 U.S., at 683.

Northern Pipeline, 102 S. Ct. at 2876-77. The plurality also stated, "[c]ritical to the Court's decision to uphold the Magistrates Act was the fact that the ultimate decision was made by the district court. 447 U.S. at 683." 102 S. Ct. at 2877. *See also Mathews v. Weber,* 423 U.S. 261, 271 (1976).

This is precisely the problem with 28 U.S.C. § 636(c). The magistrate makes the ultimate decision and enters a final judgment. Thus the provision cannot pass constitutional muster as authorizing an adjunct function of the district court.

III.
Possible Saving Provisions

The use of magistrates to conduct trials and enter final judgment implicates both due process and article III concerns. We recognize that a due process right may be waived voluntarily,[10] but there is more at stake here than the

[10] *See, e.g., Garner v. United States,* 424 U.S. 648, 653 (1976) (right against self-incrimination); *Schneckloth v. Bustamonte,* 412 U.S. 218, 222 (1973) (unreasonable searches); *Barker v. Wingo,* 407 U.S. 514, 529 (1972) (right to speedy trial); *Adams v. United States,* 317 U.S. 269 (1942) (right to jury trial and assistance of counsel); Fed. R. Civ. P. 38(d) (right to jury trial).

litigants' due process right to a decision by an article III judge. We believe that the Constitution establishes a framework of government that cannot be altered by statute nor waived by litigant consent. The independence of the judiciary, the distribution of power, and the separation of powers are at issue here. With these concerns in mind we consider the possible constitutional saving devices.

A. Litigant Consent

The strongest argument in favor of constitutionality is based on the requirement of litigant consent.[11] The Act provides that the parties must give their consent before a magistrate may conduct a trial and enter a final judgment. 28 U.S.C. § 636(c)(1).

No case squarely holds that litigant consent will solve the constitutional problems.[12] In *Kimberly v. Arms,* 129

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[11]The commentators are split on whether litigant consent cures the article III difficulties. Arguing that consent is effective to solve the constitutional problems are McCabe, *The Federal Magistrate Act of 1979,* 16 Harv. J. on Legis. 343, 374-79 (1979); Silberman, *Masters and Magistrates Part II: The American Analogue,* 50 N.Y.U.L. Rev. 1297, 1350-54 (1975) and Comment, *An Adjudicative Role for Federal Magistrates in Civil Cases,* 40 U. Chi. L. Rev. 584 (1973). Taking the contrary view are Comment, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act,* 80 Colum. L. Rev. 560, 592-96 (1980) and Comment, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View,* 88 Yale L.J. 1023, 1047-61 (1979).

[12]*Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1864) does not so hold. In *Heckers,* the parties agreed to refer the case to a referee, with the report of the referee to have the same force and effect as a judgment of the court. The parties agreed that on filing the report with the clerk of the court, judgment should be entered in conformity therewith, the same as if the case had been tried to the court. However, the opinion

U.S. 512 (1889), the Supreme Court held that upon the consent of the parties a master could hear the matter and report findings of fact and law to the judge. Responsibility for the ultimate decision remained with the judge, however, and so "judicial" power was not vested in the master. To the same effect are the *Coolidge* and *Raddatz* cases, previously discussed.

The analogy to arbitration has been suggested. If the parties can agree to submit their controversy to an arbiter, bypassing the article III judiciary altogether, the argument runs, they should also be able to authorize a magistrate to resolve their case. The analogy is inapt. When the parties use an arbiter, they do not invoke the judicial power of the United States courts. An arbiter may render a decision, but its effects flow from the parties' contractual agreement to abide by it, not from an exercise of judicial power. The arbiter has no authority to enter a judgment, and the parties must look to the courts for enforcement of an arbitration award. Also, an arbiter's decision is generally not subject to judicial review on the merits. *See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). By contrast, when parties agree to trial by magistrate, they are invoking the judicial

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makes clear that the court must review the report and decide whether or not to accept it.

> Judgment, however, cannot in general be entered in conformity to the report or award until it is accepted or confirmed by the court. Reason for the rule is, that whenever it is presented, and before it is accepted, the party against whom it is made may object to its acceptance, . . . Hearing is then had, and after the hearing the court may accept or reject the report; or, if either party desires it, the report may for good cause shown, be recommitted.

69 U.S. (2 Wall.) at 133 (footnote omitted).

system.[13] The parties use the judicial process, and the magistrate enters a judgment in the name of the court. 28 U.S.C. § 636(c)(1), (3). The magistrate's opinion is subject to review on the merits. 28 U.S.C. § 636(c)(3), (4).

The basis of the consent argument is that the right to an article III judge is a due process right, inuring to the benefit of litigants, and therefore waivable like any other due process right. *See* footnote 10 *supra*. *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962) refutes this contention. In *Glidden,* the Supreme Court reviewed cases in which a judge of the Court of Claims sat by designation on a panel of the second circuit and a judge of the Court of Customs and Patent Appeals presided by designation over a trial in the federal district court. Prior to *Glidden,* judges of the Court of Claims and of the Court of Customs and Patent Appeals had been held to be article I judges.[14] The Supreme Court found no constitutional infirmity because it held that these courts had been reconstituted as article III courts. The Court indicated that article I judges may not bind litigants in article III courts, no matter how fairly they run the proceedings. The plurality specifically praised the qualifications, fairness, and impartiality of the judges involved. 370 U.S. at 533 (plurality opinion). Due process had been satisfied by the lower court proceedings. If the right to an article III judge was only a due process right, the plurality would have terminated its discussion by noting the fair proceedings. *See* 370 U.S. at 533.

The Court's opinion in *United States v. Raddatz,* 447 U.S. 667 (1980) makes it clear that the displacement of ar-

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[13] *Muhich v. Allen,* 603 F.2d 1247, 1253 (7th Cir. 1979) (Swygert, J., dissenting).

[14] *Williams v. United States,* 289 U.S. 553 (1933); *Ex Parte Bakelite Corp.,* 279 U.S. 438 (1929).

ticle III judges by magistrates implicates both due process and article III concerns. The Court noted that having magistrates conduct suppression hearings satisfied due process by providing a hearing appropriate to the nature of the case; *Id.* at 677-81. If only due process were at stake, the Court's inquiry would have then ended. Instead, the Court went on to discuss the article III objections to magistrates holding such hearings, *Id.* at 681-83, concluding that the article III demands are satisfied where "the ultimate decision is made by the district court." *Id.* at 683.[15]

By analogy, two adverse parties from the same state cannot waive the diversity of citizenship requirement and establish jurisdiction in the federal courts.[16] Likewise, litigants cannot waive the jurisdictional requirement of an article III court.

Article III protects institutional concerns of our system of government that due process addresses only incidentally. *See Northern Pipeline,* 102 S. Ct. at 2865 & n.10-2866.

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[15]Additional support comes from *Patton v. United States,* 281 U.S. 276 (1930), which concerned the ability of a criminal defendant to waive an aspect of article III, right to trial by jury. The Court phrased the issue as follows:

> We come, then, to the critical inquiry: Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guaranty to the accused the right to such a trial?

Id. at 293. *See also id.* at 288. This phrasing indicates that some article III rights do relate to the framework of government and may not be waived by the parties. *See also id.* at 294 (quoting *Low v. United States,* 169 F. 86, 92 (6th Cir. 1909) (Lurton, J.)).

[16]*See Jackson v. Ashton,* 33 U.S. (8 Pet.) 148, 149 (1834) (parties cannot waive lack of subject matter jurisdiction by consent); *Mansfield, C. & L.M. Ry. Co. v. Swan,* 111 U.S. 379 (1884) (by estoppel); *Mitchell v. Maurer,* 293 U.S. 237, 244 (1934) (by failure to object).

For example, if Congress created an administrative agency empowered to hold fair trails in all diversity cases, due process might be satisfied even though such trials would threaten constitutional policies concerning the separation of powers, the distribution of governmental power, and the protection of judicial independence. Under those circumstances the delegation to an administrative agency would be unconstitutional, even though complying with due process. Therefore, rather than being exclusively a due process right of the litigants waivable by them, the requirement of an article III judge is jurisdictional and thus not waivable.

B. Internal Delegation

One of the dangers of diluting article III jurisdiction is the threat to the separation of powers. For example, when cases involving more than the rights of the parties before the court are committed to administrative agencies which exist at the pleasure of the political branches, there is a possibility that the exercise of judicial power will be subject to influence by those political branches. However, here the magistrates are a part of the judicial branch and it is argued that if their independence is in question, they are under the control of judges, not Congress or the President. Litigants and judges, both within the judicial branch, and not Congress or the President, decide which cases go to a magistrate rather than to an article III judge. 28 U.S.C. § 636(c). Therefore, it is argued that the magistrate system poses no separation of powers problem. Threats to the judicial decisionmaker's independence from within the judicial branch, however, may be just as serious as those from the executive or legislative branches. Magistrates might be wary of delivering unpopular opinions if the results of such decisions were curtailment of their authority, future reference in only the most mundane

or onerous cases or failure to be reappointed. *See* Comment, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act,* 80 Colum. L. Rev. 560, 591 (1980); *Northern Pipeline,* 102 S. Ct. at 2865 n.10 ("The guarantee of life tenure insulates the individual judge from improper influences not only by other branches but by colleagues as well".)

A more direct answer is that the magistrates are not insulated from legislative pressures. Their salaries[17] and their very office depend on congressional action.

"Moreover, the internal delegation argument ignores the plain import of article III's language, which authorizes article III judges, and not their delegates, to exercise judicial power." Comment, *Article III Limits on Article I Courts:* The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act, 80 Colum. L. Rev. 560, 590 (1980) (footnote omitted)

We conclude that internal delegation does not elevate § 636(c) to the attributes demanded by article III.

C. Appellate Review

The argument is made that article III is satisfied because the magistrate's decision can be appealed to an article III court, either to the district court or to the court of appeals. 28 U.S.C. § 636(c)(3)-(5); *see Crowell v. Benson,* 285 U.S. 22 (1932).

The Supreme Court implicitly rejected this contention in *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962). In one of the

[17]Magistrates' salaries are set by the Judicial Conference and may not be reduced below the level at the beginning of a magistrate's term in office. 28 U.S.C. §§ 633(c), 634(a), (b). This protection is only statutory and may be repealed by Congress at any time. This is, of course, true of the manner of appointment as well.

two cases consolidated for hearing in *Glidden,* a retired judge of the Court of Customs and Patent Appeals, sitting by designation in the U.S. district court, presided over a criminal trial. The Court was not swayed by the fact that the case had been heard on appeal by two article III courts, the court of appeals and the Supreme Court itself. *See also Ward v. Village of Monroeville,* 409 U.S. 57, 61-62 (1972).

Northern Pipeline even more emphatically rejects the appellate review argument. The Bankruptcy Reform Act of 1978 provided for appeals from the bankruptcy court either directly to the district court and then to the court of appeal or alternatively to a panel of bankruptcy judges. 28 U.S.C. §§ 1293, 1334, 1482 (Supp. V 1981). Justice White in dissent suggested that these provisions for appellate review by article III courts satisfied article III objections. 102 S. Ct. at 2894 (White, J., dissenting). The plurality labelled this reasoning "incorrect". 102 S. Ct. at 2873 n.23 (plurality opinion). The plurality later stated that the text of article III and the Court's "precedent make it clear that the constitutional requirements for the exercise of judicial power must be met at all stages of adjudication, and not only on appeal". 102 S. Ct. at 2879 n.39.

We conclude that appellate review by the district court and the court of appeals will not save section 636(c).

IV.
Retroactivity

Having held 28 U.S.C. § 636(c) unconstitutional, we must consider whether the holding should be applied retroactively or only prospectively. The question is of enormous importance, as hundreds of cases across the

country have been tried by magistrates with the consent of the parties.[18]

Northern Pipeline applied its holding that bankruptcy courts are unconstitutional prospectively. In doing so, the plurality considered three factors. The first is whether the holding in question decided an issue of first impression whose resolution was not clearly foreshadowed by earlier cases. The second is whether retrospective operation would further or retard the operation of the holding in question. The third is whether retroactive application could produce substantial inequitable results in individual cases. 102 S. Ct. at 2880 (quoting *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106-7 (1971)).

It might be argued that our holding was foreshadowed by *Northern Pipeline.* In light of the weight of the arguments on both sides, the complexity of the issue, and the fact that other provisions of the 1979 Magistrates Act have been held constitutional,[19] we find that the result was not "clearly foreshadowed".

Retroactive application would not further the operation of the holding. It is very clear that retroactive application would visit substantial injustice and hardship upon those litigants who relied upon the 1979 Act's vesting of jurisdiction in the magistrates. We hold that our decision shall not apply to all cases of this circuit that have been

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[18]According to figures provided by the Justice Department, federal magistrates terminated 262 jury and 563 nonjury trials with the consent of the parties in the year ending June 30, 1982. The magistrates also terminated 1627 consent cases without trial. Administrative Office of the United States Courts, Consent Cases Terminated by the U.S. Magistrates – Year Ended June 30, 1982.

[19]*United States v. Raddatz,* 447 U.S. 667 (1980); *United States v. Jenkins,* No. 82-1352, Slip op. at 3108-10 (9th Cir. June 28, 1983); *Coolidge v. Schooner California,* 637 F.2d 1321 (9th Cir.), *cert. denied,* 451 U.S. 1020 (1981).

finally disposed of on appeal or those for which the time for appeal has run.

CONCLUSION

The judgment of the magistrate is vacated. Our holding prohibits magistrates from entering judgments, a function reserved for article III officers. It is clear that a magistrate may perform the lesser functions of presiding over a trial and recommending a disposition, so long as the ultimate decision is made by the district judge. *Coolidge v. Schooner California,* 637 F.2d 1321, 1325 (9th Cir.), *cert. denied,* 451 U.S. 1020 (1981). Because the parties substantially and in good faith relied on the power of the magistrate to hear the case, and there is a constitutionally valid procedure available, we remand the case to the district judge to review the decision of the magistrate in the manner provided by 28 U.S.C. § 636(b)(1). Any further appeal in this case should be referred to this panel because of its familiarity with the underlying patent issues.

VACATED and REMANDED.

82-2044

No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN FOOD EQUIPMENT COMPANY,

Petitioner,

v.

FOSS AMERICA, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN FOOD EQUIPMENT COMPANY,
Petitioner,

v.

FOSS AMERICA, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent, Foss America, Inc. ("Foss"), is in essential agreement with the discussion of Petitioner, Western Food Equipment Co. ("Western"), of the case below, appearing on pages 1-2 of Western's petition under the heading "Proceedings Below". Foss wishes to augment Western's presentation merely by adding that the issue now raised by Western in its present petition was *never* raised below, either at the trial level or before the Ninth Circuit Court of Appeals. Consequently, there is absolutely no record below pertaining to this issue.

Western's "Statement of the Case", appearing on page 6 of its petition, is somewhat misleading. However, as the facts recited by Western in its Statement of the Case are immaterial to the consideration of the question presented in Western's

petition, Supreme Court Rule 34.1(g), they are treated here by footnote.[1]

SUMMARY OF ARGUMENT

There is no constitutional infirmity in the provision of the 1979 Magistrates Act, 28 USC §636(c), which authorizes a magistrate to hear and determine a civil action upon consent of the parties. Statutes passed by Congress are entitled to a presumption of constitutionality. This presumption is especially appropriate here, where Congress specifically considered and rejected the constitutional objection raised by Western. Further, the constitutionality of consensual reference of civil actions to other than Article III judges has been upheld in a long line of decisions dating back over a century.

The constitutional objection raised by Western in its petition seeks redress for an alleged violation of a due process right, namely, right to trial by an Article III federal judge. It has long been recognized, however, that due process rights of this nature are waivable. By consenting to trial before a magistrate, and by failing to object to this waiver at the trial level, Western has waived any objection it may have had.

Finally, even if this Court considers the issue raised in Western's petition to merit consideration, this case is a particularly inappropriate vehicle for resolution of the issue. Thus, Western is raising the constitutionality of its consensual reference to a magistrate for the first time in its present petition. It never raised the issue at the trial level or before the Court of Appeals. Consequently, there is a complete absence of any

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[1] Western implies that the jury rendered a verdict in favor of Western on each of the three issues recited in Western's Statement of the Case. Not so. The portion of the trial which resulted in an award of attorney's fees to Foss pursuant to 35 USC §285 was tried to the court sitting without a jury. Also, regarding Western's deceit claim, Western contends there was disputed evidence at trial. Again, not so. The alleged dispute was between two of Western's own witnesses, one of whom was the Chairman of the Board and Chief Executive Officer of Western, and it was his testimony which resulted in the trial court's dismissal of Western's deceit claim.

record to assist this Court. Should this Court conclude that this issue warrants its consideration, it is submitted that the Court should await a case wherein the issue was treated below. Such a case is now under active consideration by the Ninth Circuit Court of Appeals, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, (No. 82-3152).

ARGUMENT

I. Consensual Reference Of Civil Trials To Magistrates Under The Federal Magistrates Act Of 1979 Does Not Violate the Constitution

Both the language and the legislative history of the Federal Magistrates Act of 1979 support the constitutionality of consensual references. The 1979 Magistrates Act, 28 U.S.C. § 636 (c), provides in pertinent part:

> "(1) *Upon the consent of the parties,* a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves.
>
> (2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of their right to consent to the exercise of such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, neither the district judge nor the magistrate shall attempt to persuade or induce any party to consent to reference of any civil matter to a magistrate. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent." (Emphasis added)

It is apparent from the Act that the power granted to magistrates to decide civil matters is grounded firmly on consent. Under subsection (2), that consent must be freely forthcoming, with no manner of coercion applied to either party. Where such consent is given the parties subject themselves to the full adjudicatory power of the magistrate, and to all of its attendant consequences. In the present case, Western's consent to trial before a magistrate was knowingly and freely given. Furthermore, Western makes no attack on the quality or fairness of that trial.

Acts of Congress are, of course, entitled to a presumption of constitutionality. *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *Fullilove v. Klutznick*, 448 U.S. 448, 472-73 (1980); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964). That presumption is particularly appropriate in this case because Congress gave careful consideration to the constitutionality of permitting case-dispositive references of civil cases to magistrates before adopting Section 636(c) of the Act. Congress concluded on the basis of that analysis that consensual reference of civil cases was clearly constitutional. In reporting the Act, the Senate Judiciary Committee concluded:

> The bill makes clear that the voluntary consent of the parties is required before any civil action may be referred to a magistrate. In light of this requirement of consent, no witness at the hearings on the bill found any constitutional question that could be raised against the provision. [S. Rep. No. 96-74, 96th Cong., 1st Sess., 4 (1979)].

The House Committee report also emphasized the constitutionality of this provision.

> The committee inquired with great care into any possible constitutional objections to expansion of magistrate civil and criminal case-dispositive jurisdiction with the consent of the parties. It reviewed the printed records from the Senate and House hearings on the 89th, 90th, 94th and 95th Congresses during which this question was

also examined. Likewise, the committee reviewed its own reports from the 90th and 94th Congresses.

* * *

In addition, during the 95th Congress the Senate carefully inquired into the issue during two days of hearings and found that the legislation passed constitutional muster * * *. Since no court has found the present statutory scheme to be constitutionally defective, and several have spoken approvingly, the committee is confident that the proposed legislation passes constitutional muster. [H.R. Rep. No. 96-287, 96th Cong., 1st Sess. 7-9 (1979) (footnotes omitted)].

Congress' conclusion that the consensual reference provision of the Act is constitutional is in accord with a long line of cases going back over a century. In *Heckers v. Fowler,* 69 U.S. (2 Wall.) 123 (1865), the Court upheld a written agreement wherein the parties referred the action to a referee " 'to hear and determine the same and all the issues therein, with the same powers as the court.' " The agreement specified " 'that an order [would] be entered making such reference and that the report of the referee [would] have the same force and effect as a judgment of the court.' " 69 U.S. at 127.

Similarly, in *Kimberly v. Arms,* 129 U.S. 512 (1889), the Court upheld a consensual reference by the parties to a special master for the determination of all issues in the case. Under the terms of the reference, the master had the authority to hear and decide all issues as if the trial were conducted by the court.

Indeed, the constitutionality of the consensual reference provision of the 1979 Act was specifically upheld in the signal case of *DeCosta v. Columbia Broadcasting System, Inc.,* 520 F.2d 499 (1st Cir. 1975), *cert. denied,* 423 U.S. 1073 (1976). The court held that "parties could, without violation of Article III freely consent to refer cases to non-Article III officials for decision." 520 F.2d at 507. In reaching its decision, the court referred to *Heckers* and to *Kimberly* and found "no significant

difference between arbitration and consensual reference for decision to magistrates." In both instances, the court said, "the parties have freely and knowingly agreed to waive their access to an Article III judge in the first instance." 520 F.2d at 505.

In its petition, Western has made extensive reference to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, _____ U.S. _____, 102 S. Ct. 2858 (1982). Contrary to Western's view, *Marathon* does not suggest that case-dispositive consensual reference of civil cases to magistrates is unconstitutional. Indeed, the inference from the various opinions in *Marathon* is that a *consensual* reference to a magistrate, as opposed to the *non-consensual* reference to bankruptcy judges before the Court in *Marathon,* does not pose a constitutional problem. For example, Justice Brennan's opinion, in distinguishing between the jurisdiction conferred under the constitutionally infirm Bankruptcy Reform Act of 1978, and that of the prior Act, stated: "the referee had no jurisdiction [under the old Act], *except with consent,* over controversies beyond those involving property in the actual or constructive possession of the court." 102 S. Ct. at 2876 n. 31 (Emphasis added). Plainly, in resolving the constitutionality of a determination by other than an Article III judge, the Court considered consent of the parties to be a critical distinction between the two Acts. Similarly, writing in dissent, Chief Justice Burger noted that matters "related only peripherally to an adjudication of bankruptcy under federal law, must, *absent the consent of the litigants,* be heard by an 'Article III court' if [they are] to be heard by any court or agency of the United States." 102 S. Ct. at 2882 (Emphasis added). And Justice White, referring to the trial of state law claims by bankruptcy judges, stated that such cases "would have to be heard by Article III judges or by state courts—*unless the defendant consents to suit before the bankruptcy judge*—just as they were before the 1978 Act was adopted." 102 S. Ct. at 2884 (Emphasis added).

II. Western Has Waived Its Right To Object to the Consensual Reference Made Herein

Western never objected at the trial level to its consensual reference. Nor did it do so in its appeal filed in the Ninth Circuit Court of Appeals. Nor did it do so in its request for rehearing filed in the Ninth Circuit Court of Appeals. Western raises this issue for the first time in the present petition; this is an obvious afterthought in a last ditch effort to avoid judgment day.

Without direct case support, Western argues at pages 9-10 that the issue it now raises goes to subject matter jurisdiction, and hence can be raised at any time. This is incorrect. What is in issue here is the due process right to trial before an Article III federal judge. *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d at 506.

This Court has explicitly approved the waiver of constitutional due process rights, including the waiver of rights that would preclude adjudication by a judge of an Article III court. See, for example, *Heckers v. Fowler, supra* (parties' consensual reference of all issues to a referee to hear and determine upheld); *Garner v. United States,* 424 U.S. 648 (1976) [approval of waiver of right against self-incrimination]; *Boykin v. Alabama,* 395 U.S. 238, 243 (1969) [right to plead guilty to criminal charges]. Additionally, this Court has upheld the waiver of other basic constitutional rights, such as the waiver of a right to a jury trial, waiver of right to counsel, waiver of right to a speedy trial, and waiver of the Fourth Amendment right against unreasonable searches. Just as these basic constitutional rights may be waived, so may the parties agree to waive their constitutional right to an adjudication by a judge of an Article III court. This is precisely what Western has done here. Having done so, it hardly can now belatedly object to that waiver because the magistrate did not decide in Western's favor.

III. In Any Event, This Case Is Not An Appropriate Vehicle For Deciding The Constitutionality Of The Consensual Reference Provision Of The Federal Magistrates Act of 1979

Because Western is raising the issue of the constitutionality of the consensual reference provision of the Magistrates Act of 1979 for the first time in its Petition For Certiorari, there is a complete absence of any record below which would assist this Court should it decide the issue merits consideration. For this reason alone, it would seem appropriate to deny Western's petition in favor of a future case having a more complete record.

In this regard, there is a case now pending before the Ninth Circuit Court of Appeals, *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.* (No. 82-3152), wherein the identical issue raised by Western is now under active consideration.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Dated: July 15, 1983

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By .....

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify pursuant to the provisions of Rule 28.3 of the Rules of the Supreme Court of the United States that on July 15, 1983 I served the foregoing Brief In Opposition To Petition For Writ Of Certiorari upon all parties required to be served by depositing three printed copies thereof in a sealed envelope, with first class airmail postage prepaid, in the United States Post Office in New York, New York addressed to each of such persons at the regular office address listed below:

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